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No. 91-1545

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Petitioner,

v.

TURNER BROADCASTING SYSTEM, INC. *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the *per curiam* decision of the United States Court of Appeals for the Second Circuit affirming the district court's construction of the terms of a consent decree entered into by ASCAP and the Government in 1950 where the decisions of the courts below are founded upon a proper application of long-standing principles of consent decree construction and are consistent with prior decisions of this Court.

RULE 29.1 LIST

Turner Broadcasting System ("Turner") has no parent company or companies. In addition to its wholly-owned subsidiaries, World Championship Wrestling, Inc. is an 80%-owned subsidiary of the company. Additionally, Turner's wholly-owned subsidiary, Turner Sports Programming, Inc., has a 44% interest in a limited partnership called SportsSouth Network, Ltd. Turner also has a 51% general partnership interest and a 5% limited partnership interest in Checkout Channel, L.P. through its indirect wholly-owned subsidiary COC Holdings, Inc. Turner also has a 96% interest in Atlanta Hawks, Ltd. through Atlanta Hawks, Inc., a wholly-owned subsidiary of the company, and a 50% interest in a joint venture which acquired all the stock of HB Entertainment Co., Inc. (formerly The Great American Entertainment Company).

Home Box Office, Inc. ("HBO") is a wholly-owned subsidiary of Time-Warner, Inc. In addition to its wholly-owned subsidiaries, HBO has an interest in Black Entertainment Television, E! Entertainment Television, Inc. and Turner/HBO Limited Purpose Joint Venture.

USA Network is a partnership whose partners are MCA Cable Services, Inc. and Eighth Century Corp. MCA Cable Services, Inc. is a wholly-owned subsidiary of MCA, which in turn is an indirect wholly-owned subsidiary of Matsushita Electric Industrial Co., Ltd. Eighth Century Corp. is a wholly-owned subsidiary of Paramount Pictures Corp., which in turn is a wholly-owned subsidiary of Paramount Communications Inc.

Hearst/ABC-Viacom Entertainment Services, doing business under the name of Lifetime Television, is a joint venture operating as a partnership under the laws of the State of New York, and is composed of Hearst/ABC Video Services, which in turn is a joint venture composed of The Hearst Corporation and Capital Cities/ABC Video Enterprises, Inc., and Lifetime Holdings, Inc., a wholly-owned subsidiary of Viacom International, Inc.

The Family Channel (formerly The CBN Family Channel) is a division of International Family Entertainment, Inc.

Black Entertainment Television, Inc. ("BET") is a wholly-owned subsidiary of BET Holdings, Inc. BET has an interest in Haricom and Emerge Communications, Inc. In addition, BET operates a joint venture with Tim Reid called United Image Entertainment.

Playboy Entertainment Group, Inc. (formerly Playboy Video Entertainment Group, Inc.) is a wholly-owned subsidiary of Playboy Enterprises, Inc.

American Movie Classics Company is owned by Rainbow Program Enterprises, NBC/American Movie Classics Holding, Inc. and LMC Classics, Inc. NBC/American Movie Classics Holding, Inc. is a wholly-owned subsidiary of NBC Cable Holding, Inc., which in turn is a wholly-owned subsidiary of National Broadcasting Co., Inc., which in turn is a wholly-owned subsidiary of General Electric Company. LMC Classics, Inc. is a wholly-owned subsidiary of Liberty Media Corporation. Rainbow Program Enterprises is substantially owned, directly and indirectly, by Rain-

bow Programming Holdings, Inc., which is a wholly-owned subsidiary of Cablevision Systems Corporation.

Bravo Company is owned by Rainbow Program Enterprises (see above) and NBC/Bravo Holding, Inc. NBC/Bravo Holding, Inc.'s parent companies are the same as listed above with respect to NBC/American Movie Classics Holding, Inc.

Sportschannel Prism Associates is owned by Sportschannel Prism/Chicago Holding Partnership and NBC/SC Prism Holding, Inc. Sportschannel Prism/Chicago Holding Partnership is owned by Rainbow Program Enterprises (see above) and Rainbow Programming Holdings, Inc. (see above). NBC/SC Prism Holding, Inc.'s parent companies are the same as listed above with respect to NBC/American Movie Classics Holding, Inc.

Discovery Communications, Inc. (formerly Cable Educational Network, Inc.) has neither a parent company nor any subsidiaries to be listed.

Arts & Entertainment Network is a joint venture consisting of The Hearst Corporation, Capital Cities/ABC Video Enterprises, Inc. and RCA Cable Inc. It has neither a parent company nor any subsidiaries to be listed.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Turner Broadcasting System, Inc., USA Network, Hearst/ABC-Viacom Entertainment Services d/b/a Lifetime Television, Discovery Communications, Inc. (formerly Cable Educational Network, Inc.), The Family Channel (formerly The CBN Family Channel), Black Entertainment Television, Inc., Arts & Entertainment Network, Home Box Office, Inc., American Movie Classics Company, Bravo Company, Sportschannel Prism Associates, and Playboy Entertainment Group, Inc. (formerly Playboy Video Entertainment Group, Inc.) (the "Cable Networks") respectfully request that this Court deny the petition for writ of certiorari, filed by the American Society of Composers, Authors and Publishers ("ASCAP") on March 25, 1992, seeking review of the *per curiam* opinion of the Second Circuit Court of Appeals entered in this case on January 24, 1992.

STATEMENT OF THE CASE

The Petition for a Writ of Certiorari does not remotely meet the considerations for plenary review specified in Supreme Court Rule 10, and in fact does not make a serious attempt to argue those standards. Exercise of this Court's supervisory power is unwarranted since the decisions below are entirely consistent with past precedent. The vitality of consent decrees as an enforcement tool is in no way jeopardized by the instant case.

ASCAP is a music performing rights licensing organization long subject to government scrutiny and regulation. The decisions of the courts below involve solely the application of two provisions of the government consent decree (herein the "Decree") which regulates ASCAP's existence. The decisions require ASCAP to offer the Cable Networks two forms of licenses which, although guaranteed them under Articles V(A)[1] and

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[1] Article V(A) of the Decree orders and directs ASCAP:

> V. . . .to issue, upon request, licenses for rights of public performance of compositions in the ASCAP repertory as follows:
>
> (A) To a radio broadcasting network, telecasting network or wired music service (as illustrated by the organization known as "Muzak"), on terms which authorize the simultaneous and so-called "delayed" performance by broadcasting or telecasting. . .of the ASCAP repertory by any, some or all of the stations in the United States affiliated with such radio network or television network. . .and do not require a separate license for each station or subscriber for such performances[.]

United States v. ASCAP, Civ. No. 13-95 (S.D.N.Y. Mar. 14, 1950) (Pet. App. 96a).

VII(B)[2] of the Decree, ASCAP had refused to offer them. Although ASCAP would like to be "free to license" the Cable Networks "as it sees fit" (Pet. 8), ASCAP's licensing discretion is circumscribed by the terms of the Decree. Those decretal constraints are designed to minimize ASCAP's ability to impose the market power it wields, in a market for music licensing that is *not* freely competitive.[3] The effect of the decisions is that the Cable Networks will receive the same types of ASCAP licenses provided to their over-the-air television network counterparts (pursuant to those same Decree provisions).

The first license form, set forth in Article V(A), contemplates that suppliers of network programming acquire a single, all-encompassing license from ASCAP "at the source," such license to cover whatever public performances of copyrighted music occur when network programming is transmitted through to the ultimate viewer. This "through-to-the-viewer" license obviates the need for any other entity involved in the transmission of programming to the viewer, *e.g.*, an affiliated station or cable system operator, to obtain an additional license.

Contrary to the impression ASCAP creates in its petition (Pet. 2), it is ASCAP, not the Cable Net-

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[2] Article VII(B) (Pet. App. 98a-99a) states in pertinent part:

> VII. Defendant ASCAP, in licensing rights for public performance for radio broadcasting and telecasting, is hereby:. . .(B) Ordered and directed to issue to any unlicensed radio or television broadcaster, upon written request, per program licenses. . . .

[3] *See ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563 (2d Cir. 1990).

works, that seeks to alter a well-established licensing pattern for network entities, including cable networks.[4] ASCAP has licensed radio broadcasting networks "at the source" since 1941, broadcast television networks and wired music services "at the source" since 1950, and cable television networks "at the source" since 1977. Only during 1988 did ASCAP announce its refusal to continue to issue such licenses to the Cable Networks, in the hope instead of separately licensing individual cable system operators and thereby extracting more money from the cable television industry.[5]

The second license form that ASCAP would deny the Cable Networks is a per program license, an alternative form of license to the more prevalent "blanket" license. The requirement that ASCAP offer a

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[4] The cable networks licensed at the source from 1977 to 1988 include HBO, Showtime, the Movie Channel (and its predecessor the Star Channel), The Disney Channel, MTV Networks, The Nashville Network, and the Weather Channel, Inc. *See, e.g.*, JA 343, 349-50, 358, 365. Although ASCAP labelled a number of these agreements "experimental" and/or non-prejudicial (Pet. 8), as the district court found, "none of the 'without prejudice' provisions specifically targeted the 'licensing at the source' term." Pet. App. 35a.

[5] ASCAP's contention in its petition that it seeks to license system operators because it is "less complicated" to do so (Pet. 8) and because the system operators have similar music usage (Pet. 13) is neither credible nor factually accurate. As ASCAP's General Counsel candidly advised the District Court: "ASCAP decided to deal directly with the cable system operators to license all their performances. The reasons are quite simple. . .by far the greater amount of money, is the systems'. . ." Affidavit of Bernard Korman, ¶¶ 12-13 (JA 151).

per program license is also long-standing; its purpose is to afford users of ASCAP's repertory the opportunity to limit their dependence on the blanket license and foster opportunities for competitive licensing options to develop.

ASCAP's Historic Licensing of Networks

The purpose of the Decree's "at the source" and per program licensing guarantees for network transmissions—cable and otherwise—is not merely that these licensing mechanisms "made sense" for the radio and television industries, as ASCAP now contends. Pet. 13. As the courts below found, those licensing options reflect long-standing views, held by the Government, licensees, and even formerly ASCAP, as to the appropriate manner in which the licensing of music performing rights should occur in the face of ASCAP's potential for exercising the very significant market power it possesses.

1. The 1941 Decree

The concepts of "through-to-the-viewer" and per program licensing reflected in Articles V(A) and VII(B) of the Decree were first incorporated in the 1941 antitrust consent decree entered into by ASCAP and the Government.[6] The 1941 Decree restricted ASCAP's ability to license musical works.[7] Specifically, Article II(3) required ASCAP to issue to radio broadcasters, on request, a per-program license alternative, *id.* at 32 (JA 314), and Article II(4) incorporated as a basic tenet of ASCAP's operations the principle of

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[6] Complaint and Consent Decree in *United States v. ASCAP*, Civ. No. 13-95 (JA 297, 314).

[7] *Id.* at 28-38 (JA 312-17).

"through-to-the-viewer" licensing of network transmissions, *id.* at 33 (JA 314).

The "through-to-the-viewer" provision embodied in Article II(4) addressed concerns raised by the Government in its 1941 complaint regarding ASCAP's ability to exploit its control of the music market in the context of the network-affiliate relationship, and specifically, its ability to exact supra-competitive license fees from down-the-line users of music.[8] Network entities controlled program and music content, and therefore possessed a degree of bargaining leverage with ASCAP, which network affiliates, having no such control, lacked. Barring a through-to-the-viewer license requirement, such affiliates would face no choice but to accept any license offered on a take-it-or-leave-it basis by ASCAP, lest they be liable for copyright infringement.[9]

To stem such opportunity for abuse of ASCAP's significant market power, Article II(4) required ASCAP to issue licenses to the radio networks that would encompass the performance of programming "by all stations on the network" and precluded ASCAP from seeking separate licenses for such programming from local radio affiliates. *Id.* at 33 (JA 314). The 1941 Decree thus established the principle that in a network-affiliate relationship, the originator of the package of network programming, who possesses the greatest control over which programming and music is to be aired, is the proper entity to be licensed by ASCAP for the transmission of ASCAP music to the ultimate consumer.

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[8] *See id.* at 7-8, 13-14 (JA 301-02, 304-05).

[9] *Id.*

2. The Ensuing 1950 Decree

In 1950, the Decree was significantly altered and broadened, triggered by the holding of the 1948 *Alden-Rochelle* opinion,[10] the emergence of television as a new medium of mass communication, as well as complaints to the Justice Department about the adequacy of the 1941 Decree. In the words of the court charged with supervising the Decree, the new constraints retained as their central objective "foster[ing] the goal of competition" in the "admittedly far from. . .perfect market" for the licensing of music performing rights. *United States v. ASCAP*, Civ. No. 13-95 (WCC), Opinion and Order (May 15, 1984) (Conner, J.) at 8, 10 (JA 699, 701). Article V(A) of the revised Decree broadened Article II(4) of the earlier decree so as to ensure not merely radio broadcasting, but also "telecasting" and wired music networks, of the right to acquire a single license from ASCAP covering all performances by affiliates of the programming transmitted. And, as the district court concluded and the contemporaneous statements of the negotiators make clear, the terms of Article V(A) were

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[10] *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948), *relief*, 80 F. Supp. 900 (S.D.N.Y. 1948). *Alden-Rochelle* was an antitrust action brought in the late 1940's by motion picture theatre exhibitors against ASCAP, challenging ASCAP's and its members' practice of withholding licenses "at the source" from motion picture producers and instead requiring exhibitors to obtain blanket licenses to perform films. This practice, condemned by the courts, enabled ASCAP to exact unreasonable fees from the exhibitors, who, like the local radio stations before the 1941 Decree, were put in a "take it or leave it" position by ASCAP, and could either pay what ASCAP demanded or forego any films that incorporated ASCAP music. *Alden-Rochelle*, 80 F. Supp. at 894-95.

intended to encompass all industrial situations where it could feasibly apply[11], and not simply be frozen in time to encompass only the radio and television industries as they existed in 1950.

Article VII, in turn, required ASCAP, in licensing public performance rights for "radio broadcasting and telecasting" to offer a per program license option, an option which was given teeth through Article VIII's requirement that ASCAP use its best efforts to avoid discrimination among the fees it establishes under its blanket and per program licenses so as to deprive licensees of a "genuine choice" between those licenses. Pet. App. 98a-99a.

The Cable Networks

Although ASCAP in its petition recycles arguments about alleged differences between cable and over-the-air networks (Pet. 6-7, 13), as the courts below recognized, in all matters pertinent to the licensing issues now before this Court, the Cable Networks and their over-the-air counterparts (*e.g.*, NBC) are functionally identical, direct competitors who make similar use of music in their programming. The Cable Networks provide a package of programming to their affiliates, just as over-the-air networks do, for delivery to viewers. This programming consists of original entertainment programming, news, sports, motion

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[11] *See, e.g.*, Department of Justice Memorandum from Sigmund Timberg to J. Francis Hayden, March 9, 1949 at 2 (JA 743) (such licensing "seems desirable for any other industry where it is feasible to collect royalties in a similar manner"); ASCAP Memorandum re Conference with Department of Justice, July 6, 1949 at 3 (JA 710) ("[i]n providing for licensing at the source, [the decree was to] use general language with illustrations rather than providing for specific cases for licensing at the source.")

pictures, series, and, in certain cases, programming previously shown on over-the-air networks. The Cable Networks acquire programming in the same way as over-the-air networks: they obtain national rights to the programs they distribute, again just as over-the-air networks do, and—with the lone exception of music performing rights—warrant to their affiliates that they have the right to authorize subsequent use. Affidavit of Terence F. McGuirk, ¶¶ 6-11 (JA 390-93); *see also* Affidavit of Brenda L. Fox, ¶¶ 14-20 (JA 830-34).

With respect to programming, the Cable Networks' affiliates act in a manner functionally indistinguishable from television stations affiliated with the over-the-air networks. They receive programming from the networks and are obligated to retransmit it, without alteration, to their subscribers. They have no control over the selection of programming or music contained in that programming. McGuirk Aff. at ¶ 11 (JA 392-93). Viewers, in turn, receive on their television sets programming originated by the Cable Networks and the over-the-air networks. In cabled households, over-the-air and cable networks are received through the same wire attached to each household's television set. *Id.* at ¶ 11 (JA 393). Similarly, the Cable Networks and their over-the-air counterparts compete directly for advertisers, viewers and programming. *Id.* at ¶¶12-16 (JA 393-95); *see also* Affidavit of Farrell B. Reynolds, ¶¶1-8 (JA 408-11).

Proceedings Below

Turner Broadcasting System, Inc. ("Turner") initiated this proceeding on January 13, 1989. Turner sought an order compelling ASCAP to issue a network license consistent with Article V(A). So much

of Turner's request as is involved in this proceeding was ultimately joined in by the sixteen other Cable Networks. Turner also requested that the court order ASCAP to offer it a "per program" license as an alternative to the blanket license.[12]

On May 19, 1989, ASCAP moved for partial summary judgment, seeking dismissal of so much of that part of the Cable Networks' license requests as sought to compel the issuance of through-to-the-viewer licenses. ASCAP's motion was subsequently extended to encompass the question of whether the Cable Networks are entitled to a per program license as an alternative to the blanket license. At the invitation of the district court, the Department of Justice proffered its views on both issues.[13]

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[12] The issue of the Cable Networks' entitlement to a per program license had been raised in the previously filed *Showtime/The Movie Channel* proceeding. *United States v. ASCAP, Application of Showtime/The Movie Channel, Inc.*, Civ. 13-95 (WCC) (S.D.N.Y.). The parties to that proceeding subsequently agreed to consider that issue in this proceeding.

[13] The Department acknowledged with respect to Article V that technological change was foreseeable in 1950, that the precise mode of television transmission between network and affiliate is irrelevant to Article V, and that it would not impermissibly strain Article V to include cable networks within the Article's ambit, and suggested that the objectives of Article V(A) would be furthered by doing so. Memorandum For the United States on Decree Construction Issues at 7-9 (JA 904-06). The Department nevertheless concluded before the district court—on what it termed a "close" issue—that Article V did not obligate ASCAP to issue the licenses sought by the Cable Networks because it viewed the phrase "stations. . .affiliated with. . .a television network", as commonly understood, to en-

By Memorandum Opinion dated July 11, 1991, Magistrate Judge Dolinger, to whom the matter had been referred for all purposes, directed ASCAP to offer the Cable Networks a through-to-the-viewer blanket license and to make a per program license also available. The district court's opinion was analytically straightforward. The court first rejected ASCAP's assertion that Article V unambiguously precludes cable networks from its benefits. The court found that the terms "telecasting network" and "stations. . .affiliated with such. . .television network" were not, as ASCAP claimed, self-evidently limited to over-the-air broadcasting, but were ambiguous.[14] After considering the appropriate standards for consent decree interpretation set forth in *United States v. Armour & Co.*, 402 U.S. 673 (1971) and *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975) and their progeny, the court construed Article V(A) by examining extrinsic evidence, including the circumstances surrounding the formation of the consent order, the meaningful indicia of the purpose of the contested provision, and any technical meaning words used may have had to the parties.[15]

From such analysis, the court found that Article V should be construed to cover the Cable Networks. It determined that "the intended reach of Article V was defined in functional terms, that is, to protect the ultimate users of ASCAP music who would otherwise

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compass over-the-air stations. *Id.* at 2, 9 (JA 899, 906).

As we discuss below, the Department declined to press these conclusions before the Second Circuit.

[14] Pet. App. 22a.

[15] Pet. App. 18a-34a.

be subjected to 'the harassment of suits' if they failed to comply with ASCAP's fee demands." Pet. App. 33a. As a consequence, the court found the term "telecasting network" should "be read in its functional sense, that is, to cover the supplying of programming by a packager to another entity for transmission, under the packager's name, to household televisions, and should not be limited based on either the particular technology used to transmit the programs into the homes of the ultimate audience or the particular financial arrangement existing between the packager and the local transmitter of the programs."[16]

With respect to the issue of per program licensing, the court similarly found that the contested decree terms were ambiguous and not self-evidently limited to over-the-air television broadcasters. Specifically, it found that

> [T]he language of Article VII, the evident and stated purpose of the per-program provision and the references to it by the negotiators both to each other and to the court all suggest that this provision should be read to encompass television, irrespective of

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[16] *Id.* The district court rejected ASCAP's claim that differences between over-the-air and cable television preclude an interpretation of Article V to cover cable television. To the court, "none of the differences cited by ASCAP reflect[ed] on the rationale for requiring 'licensing at the source' in television," and none "of the cited unique characteristics of over-the-air television appear to have guided the approach of the negotiators in drafting Article V(A)." *Id.* at 49a. Essentially, the court found that there were no material differences between broadcast and cable television that had a bearing on the principles embodied in Article V, or their intended application to network users.

> whether the programming is transmitted over the air or by cable. To do otherwise would import into the Decree a distinction that seems to have been altogether foreign to the concerns of the negotiators as well as profoundly subversive of the purpose sought to be achieved by the inclusion of an expanded per-program license provision in the 1950 Decree.[17]

The district court entered an order and judgment requiring ASCAP to offer both the network license and the per program license to the Cable Networks. ASCAP then appealed that ruling to the Second Circuit. The Department, a party to the Decree with standing to appeal, declined to participate in ASCAP's appeal to the Second Circuit and informed the court that it would remain neutral on these issues of decree construction.

On January 24, 1992, the United States Court of Appeals for the Second Circuit affirmed *per curiam*, "substantially for the reasons stated" by the district court. Pet. App. 4a.

SUMMARY OF REASONS FOR DENYING THE WRIT

Petitioner's argument for review boils down to the assertion that the courts below "set[ ] new standards of consent decree construction" by impermissibly stretching the terms of the decree and by "ignor[ing] the clear original intent" of the parties to the decree. Pet. 2, 11. ASCAP further contends that allowing this case to stand unreviewed will have a major impact on the willingness of parties to sign consent

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[17] *Id.* at 67a-68a.

decrees, and will compel ASCAP to license the Cable Networks in a way which will be inefficient for ASCAP and in a manner it never contemplated. Pet. 2-3. ASCAP's arguments, however, are hyperbole that do not withstand scrutiny.

In reality, the courts below reached their conclusion that ASCAP must offer through-to-the-viewer and per-program licenses by faithfully following and applying the long-standing principles for consent decree interpretation set forth by this Court in *United States v. Armour & Co.*, 402 U.S. 673 (1971) and *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975), the latter of which ASCAP completely ignores. Exercise of this Court's supervisory powers is unwarranted since the decisions below broke no new ground and in fact are properly consistent with past precedent.

REASONS FOR DENYING THE WRIT

I. The Courts Below Followed The Appropriate Methods For Consent Decree Construction Consistent With The Prior Decisions Of This Court

Neither the court of appeals in its *per curiam* opinion nor the district court broke new ground or in any way departed from controlling precedent with respect to consent decree construction in concluding that the relevant decree provisions require ASCAP to offer the Cable Networks the licenses they seek. To the contrary, in reaching the conclusion that Articles V and VII of the Decree compel ASCAP to issue the two forms of licenses requested by the Cable Networks, the district court carefully followed governing precedent, including the standards for consent decree construction set forth by this Court in *Armour* and

ITT Continental Baking, the latter a case which ASCAP even fails to mention in its Petition.

Pursuant to the guidelines set forth in prior Court decisions, the district court first determined that the relevant decree terms were ambiguous. It then conducted an exhaustive review of the decree's history and purpose in order to ascertain the meaning of the contested terms. In taking this course, the district court correctly recognized that the four corners approach advocated by ASCAP applies where the language of a decree has a clear and unambiguous meaning—and is susceptible to only one reasonable interpretation. Pet. App. 19a (citing *Armour*, 402 U.S. at 680-83). Where, however, "the wording is susceptible to more than one reasonable construction, then the court must look to extrinsic evidence, as is the case with ambiguous contracts." Pet. App. 19a (citing *ITT Continental Baking*, 420 U.S. at 238). The methodology to be employed in such circumstances has been laid out by this Court:

> reliance upon certain aids to construction is proper. . .includ[ing] the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree. Such reliance does not in any way depart from the 'four corners' rule of *Armour*.

ITT Continental Baking, 420 U.S. at 238; *see also* Pet. App. 19a-20a.

This is precisely the approach pursued below. To have avoided the analysis in which the district court engaged would have been to depart from the governing precedents, not *vice versa*.

Moreover, the district court correctly recognized that to follow ASCAP's truncated approach was particularly inappropriate in this case. It acknowledged that cases advocating a restrictive reading of decree provisions have arisen in circumstances—unlike those presented herein—involving the issue of whether a decree has been violated. Pet. App. 21a. In such instances, a narrow analysis avoids the potential for a defendant to be "penalized for behavior not prohibited at all by the order." *ITT Continental Baking*, 420 U.S. at 237 (discussing *Armour*). In cases without the risk of penalty, such as the instant action, however, reliance on equitable principles is appropriate. *See Chrysler v. United States*, 316 U.S. 556 (1942); Pet. App. 21a; *see also ITT Continental Baking*, 420 U.S. at 236 n.10 (recognizing that a consent decree is not merely a contract, but also a judicial act); *United States v. American Cyanamid Co.*, 719 F.2d 558, 563-64 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984).

In short, this case presents no legal issue and no conflict with existing law or between the Circuits that warrants this Court's intervention.

II. The Courts Below Correctly Applied The Governing Standards To The Facts Of This Case

The courts below, moreover, correctly applied the governing standards in reaching their conclusion that Articles V(A) and VII(B) of the Decree cover cable networks. While ASCAP seeks review of this outcome by claiming that the district court ignored the "unambiguous" terms of the decree and "the clear original intent" of the parties (Pet. 11-12), there is simply no support for ASCAP's contention that the lower court's application of these standards is so at variance

with accepted practice as to justify an exercise of this Court's supervisory powers.

As the district court recognized, ASCAP cites no specific language in the Decree or in the voluminous record of this case indicating that the terms "telecasting network" and "stations. . .affiliated" with such networks are clear on their face or were intended to be limited to over-the-air television networks as they existed in 1950. In fact, far from "stretch[ing] the decree's carefully limited scope" (Pet. 11), or, as ASCAP hyperbolically claims, from "ripp[ing] [the terms] out of context and appl[ying] [them] to unforeseen and radically different circumstances" (Pet. 14), the district court closely scrutinized the terms of the Decree and, upon examination, rejected ASCAP's claim that those terms unambiguously preclude their application to cable networks. Insist as it might, ASCAP lacks a shred of record support for its position.

Moreover, when the district court properly employed aids to construction, it became overwhelmingly apparent that Articles V(A) and VII(B) apply to cable networks. As the district court observed, the limitation that ASCAP now presses on this Court was then, and is now, irrelevant to the overarching policy objectives of that provision and would contravene both the contemporaneous understanding of the parties regarding the meaning and purpose of Articles V(A) and VII(B) and the public policies embodied in the Decree. Further, such an interpretation would slight the parties' acknowledgment in 1950 that television was an evolving medium, then in its infancy.[18] The

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[18] ASCAP's assertion that the courts below "rewrote" or somehow modified the decree is, as demonstrated above, base-

court therefore correctly read Articles V(A) and VII(B) to cover cable networks; ASCAP's claims to the contrary are lacking in merit.

III. ASCAP's Dire Predictions Regarding The Effects Of The Decisions Below Are Unfounded And Do Not Form A Basis For Review By This Court

ASCAP darkly predicts that the lower courts' decisions will "have a major impact on the willingness of parties to sign a consent decree" (Pet. 11), thereby "hinder[ing] the effective administration of the antitrust laws" and "burden[ing] the courts with trial of cases that might have been resolved by consent judgments" (Pet. 2-3). ASCAP also expresses consternation that the decisions below will "compel ASCAP forever to license cable in a way it never agreed to do and does not wish to do" (Pet. 3), and "if permitted to stand, will prevent the most efficient licensing of music on cable" (Pet. 16).

ASCAP's assertions and fears are entirely unsupported. First, the decisions of the courts below are consistent with the decisions of this Court as well as other federal courts. They profess no general pronouncements at odds with precedent. And while AS-

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less. Moreover, ASCAP's suggestion (Pet. 15) that Article XVII—which permitted reopening the Decree after five years—represented the exclusive mechanism for adjusting to new technological developments does not withstand scrutiny. As the district court recognized, the "inclusion of this provision is evidence of the parties' understanding that experience with the decree or changes in the industry might in the future justify additional modifications to the Decree. It does not suggest, however, that they intended the Decree, as drafted, to have a limited useful life." Pet. App. 34a n.8 (citation omitted).

CAP may be upset at the outcome of the application of those precedents to these facts, surely those fact-specific findings form no basis for the generalized concerns ASCAP baldly advances.

Similarly, while ASCAP is undoubtedly concerned about having to do business in a way it "does not wish to," such a concern neither motivated the adoption of Article V(A) and Article VII(B), nor presents a basis for this Court to exercise its supervisory powers.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated this 24th day of April, 1992.

Respectfully submitted,

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